IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.358 OF 2005

M/s. Leela Enterprises
a partnership firm duly registered
under the provisions of Indian
Partnership Act, 1932 and having
its registered office at "A" Wing,
1st floor, Dattani Towers, Kora
Kendra, S.V.Road, Borivali(West),
Mumbaui 400 092. ...Appellant

Vs.

1. The Bombay Municipal Corporation
a statutory Corporation having its
office at Mahapalika Marg,
Mumbai 400 001.

2. The Executive Engineer (Building
Proposal) Department, "R" Ward,
Municipal Corporation of Greater
Mumbai.

3. The Assistant Engineer (Building
Proposal) Department, "R" Ward,.
Municipal Corporation of Greater
Mumbai. ...Respondents

Mr.Narula i/b M/s.Jhangiani Narula & Associates for the Appellant
Ms Geeta Jogalekar for the Respondent No.1.

CORAM: A.S.OKA, J.
DATED: 26th & 27th APRIL 2005.

ORAL JUDGMENT.:

1. This Appeal from Order was fully heard Yesterday at admission stage and today it is kept for dictation of the Judgment.

2. The Appellant in this Appeal high handedly and illegally constructed a building consisting ground plus seven upper floors when permission granted was for construction of only a ground floor. Without there being any occupation or completion certificate, he has inducted the flat purchasers in the flats in the building. The question before me is whether such a builder is entitled to grant of discretionary and equitable relief of temporary injunction.

3. It is necessary to refer the facts of the case. The Appellant is the original Plaintiff. The Appellant applied for permission to construct a building. Plans were approved by the Respondent No.1-Corporation for construction of only a ground floor for residential use. Intimation of disapproval was issued on 9th December 1999. The Commencement certificate was issued on 3rd February 2000. On 27th August 2001 an application was made by the Architect of the Appellant to the Respondent No.1-Corporation. In the said application it was stated that though earlier plans were approved for ground floor, additional seven floors were proposed in lieu of transferable Development Rights (hereinafter referred to as the TDR) admeasuring 1030 sq.meters. It was stated in the application that the Respondent No.1-Corporation may process the files and issue T.D.R. at the earliest.

4. The case of the Appellant-Plaintiff is that as there was

a dispute between the owners of the T.D.R. and the Appellant, the transaction of acquiring T.D.R. could not be materialised. In the meanwhile, the Appellant entered into the agreements with prospective flat purchasers. The Appellant proceeded with the construction of upper floors. The case of the Appellant is that he proceeded in anticipation of acquisition of T.D.R. It is the specific case of the Appellant that in March 2001, the flat purchasers were put in possession of the flats.

5. A notice dated 3rd December 2002 under Section 53 (1) of Maharashtra Regional and Town Planning Act, 1966 (hereinafter referred to as the said Act of 1966) was issued by the Respondent No.1-Corporation to the Appellant stating therein that the work of seven floors is beyond approved plan and was contrary to the commencement certificate. It is stated in the notice that the user of the ground floor is changed from residential to shop and the building is unauthorizedly occupied.

6. A reply was sent by the Appellant on 15th January 2003 to the said notice in which it is stated that the efforts of the Appellants made earlier for securing T.D.R. could not materialise. The Appellant accepted that a mistake has been committed by carrying on construction. It is stated that due to pressure exerted by the flat purchasers, the Appellant was required to put them in possession of their respective flats.

It is stated that the Appellant was in the process of acquiring the T.D.R. and therefore the matter should not be processed further. Thereafter, letter dated 12th March 2003 was sent by Assistant Engineer of Respondent No.1 to the owner of the property calling upon him to get the building vacated. A copy of the said letter was forwarded to the Architect of the Appellant. By a letter dated 1st April 2003, the Appellant informed the Executive Engineer of the Respondent No.1 that the Appellant was in process of acquiring T.D.R. and necessary compliance will be made within one and half months and a request was made to the Respondent No.1 not to take any further action. The suit was filed by the Appellant praying for various reliefs. The prayers made in the said suit read thus :

(a) That by a mandatory order of this Hon'ble court the Defendants be directed to -

(i) Process of all the files listed in para 9 hereinabove pending with the Chief Engineer (D.P.) of the Defendant Corporation and issue the Development Right Certificate as per the proposal submitted by the Plaintiffs and thereafter.

(ii) Consider the proposal for regularisation of the suit building No.3 'A' wing, Leela Vaibhav situated on plot of land bearing CTS No.872-A Village Kandivali (West) after giving personal hearing to the Plaintiffs and pass a reasoned order.

(b) That the Defendants their servants, agents, officers, employees and/or any other person claiming through them during final determination and one month after the reasoned order is communicated to the Plaintiffs be restrained by an Order and

injunction of this Hon'ble Court from taking any steps and/or acting in furtherance of said notice dated 12th March 2003 of Exhibit 'G' hereto issued under Section 353-A of the Mumbai Municipal Corporation Act, 1888 and notice under Section 53(1) of the Maharashtra Regional and Town Planning Act, 1966 or demolishing the suit building No.3 'A' Wing, Leela Vaibhau situated on plot of land bearing C.T.S.No.872-A of village Kandivli at Kandivli (W), Mumbai or any part thereof.

7. A Notice of Motion was taken out by the Appellant-Plaintiff for injunction restraining the Respondent No.1-Corproation from taking any steps in furtherance of notice dated 12th March 2003 of demolition of the building in question.

8. The Notice of Motion was opposed by the Respondent No.1-Corporation by filing Affidavit-in-reply. It is pointed out that the construction made by the Appellant is unauthorised. A reference was made to various notices issued by the Respondent No.1-Corporation. By impugned Judgment and Order, the learned Trial Judge dismissed the Notice of Motion.

9. Shri Narula, learned Counsel appearing for the Appellant submitted that the construction was carried out by the Appellant in anticipation of T.D.R. becoming available. He submitted that the requisite T.D.R. is now available and on the basis of the said T.D.R. which is now available the

construction of the entire building can be regularised. He stated that as the files are pending before the Respondent No.1 for processing the TDR, the prayer a(i) in the plaint was made by the Appellant. He submitted that in the interests of the flat purchasers the construction was completed and the flat purchasers were placed in possession as they had invested substantial amounts. Shri Narula placed reliance on the decision of the Apex Court reported in A.I.R.1956 S.C. page No.110 (Corporation of Calcutta Vs. Mulchand Agarwala). He heavily relied upon the decision of the Apex Court reported in 1995 Supp. (4) S.C.C. page No.426 (Syed Muzaffar Ali and others vs. Municipal Corporation of Delhi). He submitted that now it is possible to regularise the construction. He urged that in view of the mandate of the decisions of the Apex Court, injunction ought to have granted by the Trial Court as now sufficient T.D.R. is available.

10. The learned Counsel for the Respondent No.1 submitted that considering the conduct of the Appellant, impugned Judgment deserves to be confirmed. The learned Counsel for the Respondent No.1 has taken me through various documents on record.

11. It is well settled that the relief of temporary injunction under Order XXXIX of Code of Civil Procedure, 1908 is a discretionary and equitable relief. The principles

relating to grant of injunction are governed by the Specific Relief Act, 1963 which enshrines the principles of equity. It is also well settled that the scope of an Appeal preferred under Order LXIII 1(r) of the said Code for challenging a discretionary order is limited. The position of law in that behalf is no longer res integra. If the discretion is exercised by the Trial Court reasonably and in judicial manner, merely because the Appellate Court would have taken a different view of the matter may not justify interference with the exercise of discretion by the Trial Court. Unless the order is shown to be perverse or arbitrary, interference cannot be made with the exercise of discretion. Since the Appeal against the discretionary order is said to be an Appeal on principle, the scope of the Appeal is limited as stated above. Therefore, this Appeal will have to be decided keeping in mind the aforesaid principles which are laid down by the Apex Court in a Judgment reported in 1990 (Supp.) Supreme Court Cases page No.727 (Wander Ltd. Vs. Antox India (P) Ltd.

12. The building plan of the Appellant was sanctioned in December 1999 only in respect of the ground floor. It is an admitted position that though no application was made thereafter for obtaining sanction for construction of upper floors, the Appellant proceeded with the construction. In fact in paragraph 8 of the plaint a specific averment is made that in or about March 2001 to avoid further complications on

account legal proceedings which may be initiated by the flat purchasers, the Plaintiffs handed over the possession of the flats in the suit building to the respective purchasers. Thus, the construction of the seven upper floors was completed in March 2001. It is interesting to note that on 27th August 2001 the Architect appointed by the Appellant submitted a letter to the Assistant Engineer of the Building Proposal Department of the Respondent No.1-Corporation. Along with the said letter he forwarded amended plans. It is pertinent to note that in the said letter the fact that the construction of upper floors is completed and that the flat purchasers are inducted is completely suppressed by the Architect. The amended plans which were tendered along with the letter were for additional seven floors on the basis of F.S.I. which was likely to become available on the basis of acquisition of T.D.R. admeasuring 1030 sq.meters. The averments made in paragraph 5 of the plaint clearly show that the efforts made by the Appellant for acquiring T.D.R. from the T.D.R. owners could not be materialised.

13. A Notice was issued under Section 53(1) of the said Act of 1966 by the Respondent No.1-Corporation on 3rd December 2002. Notice alleges that there is an unauthorised construction of 7 floors and that though sanctioned user of the ground floor was residential, the user was unauthorizedly changed to a shop. Another ground in the notice is that the building was unauthorizedly occupied. A reply was sent by

the Appellant to the said notice. In the reply the Appellant admitted the mistake committed by him. The Appellant also admitted that the efforts to secure T.D.R. have failed. It is stated there was a shortage of T.D.R. It is contended that due to time bound agreement entered into with respective flat purchasers, the Appellant was required to part with possession of the flats in favour of the flat purchasers.

14. Necessary reference will have to be made to Section 53(1) of the said Act of 1966 which read thus :

> 53. Power to require removal of unauthorised development -
>
> (1) Where any development of land has been carried out as indicated in sub section (1) of section 52 the Planning Authority may, subject to the provisions of this section [****] serve on the owner a notice requiring him, within such period, being not less than one month, as may be specified therein after the service or the notice, to take such steps as may be specified in the notice.
>
> (a) in cases specified in clause (a) or (c) of sub-section (1) of section 52 to restore the land to its condition existing before the said development took place.
>
> (b) in cases prescribed in clauses (b) or (d) of sub-section (1) of section 52, to secure compliance with the conditions or with the permission as modified.
>
> . Provided that, where the notice requires the discontinuance of any use of land, the Planning Authority shall serve a notice on the occupier also.
>
> (2) In particular, such notice may, for purposes of sub-section (1), require -
>
> (a) the demolition or alteration of any building

or works;

(b) the carrying out on land of any building or other operations; or

(c) the discontinuance of any use of land.

(3) Any person aggrieved by such notice may, within the period specified in the notice and in the manner prescribed apply for permission under section 44 for retention on the land of any building or works or for the continuance of any use of the land, to which the notice relates, the pending the final determination or withdrawal of the application, the mere notice itself shall not affect the retention of buildings or works or the continuance of such use.

(4) The foregoing provisions of this chapter shall, so far as may be applicable, apply to an application made under sub-section (2).

(5) If the permission applied for is granted, the notice shall stand withdrawn; but if the permission applied for is not granted, the notice shall stand; or if such permission is granted for the retention only of some buildings, or works, or for the continuance of use only a part of the land, the notice shall stand withdrawn as respects other buildings or works or other part of the land, as the case may be; and thereupon, the owner shall be required to take steps specified in the notice under sub-section (1) as respects such other buildings, works or part of the land.

(6) If within the period specified in the notice or within the same period after the disposal of the application under sub-section (4), the notice so much of it as stands is not complied with, the Planning Authority may-

(a) prosecute the owner for not complying with the notice; and where the notice requires the discontinuance of any use of land any other person also who uses the land or causes or permits the land to be used in contravention of the notice; and

(b) where the notice requires the demolition or alteration of any building or works carrying

out of any building or other operations, itself cause the restoration of the land to its condition before the development took place and secure compliance with the conditions of the permission or with the permission as modified by taking such steps as the Planning Authority may consider necessary including demolition or alteration of any building or works or carrying out of any building or other operations; and recover the amount of any expenses incurred by it in this behalf from the owner as arrears of land revenue.

(7) Any person prosecuted under clause (a) of sub-section (6) shall, on conviction, [be punished with imprisonment for a term [which shall not be less than two thousand rupees but which may extend to five thousand rupees, and in the case of a continuing offence with a further daily fine which may extend to two hundred rupees] for every day during which such offence continues after conviction for the first commission of the offence.

Sub-Section 3 provides a remedy to the person aggrieved by the notice under sub-section 1 of applying for permission under Section 44 for retention of the building. The Application has to be made within the period specified in the notice. A period of one month was given by the said notice to the Appellant. Admittedly the Appellant has not applied for retention of the structure within the time specified under Sub Section 3 of Section 53 by invoking Section 44 of the said Act of 1966. Section 44 contemplates application being made to the Planning Authority for permission for development. Section 44 contemplates that the application shall be in writing in such form and shall contain such particulars and shall be accompanied by such documents as may be prescribed. Rule 6 of the Relevant Rules prescribes form

of such application and accompaniments of such application. Thus, the Appellant did not avail of the remedy available under Sub Section 3 of Section 53. In fact, till today no such application has been made by the Appellant. In the reply dated 15th January 2003 sent to the notice, the Appellant has candidly admitted that he could not secure T.D.R.

15. Therefore, scenario which emerges is that there was never any permission granted for construction of seven upper floors. The application made on 27th August 2001 was not considered by the Respondent No.1-Corporation obviously because at no point of time the Appellant secured the requisite T.D.R. As stated earlier, in the application filed by the Architect on 27th August 2001, there was a suppression of material fact that the construction of seven floors was completed and the flat purchasers were already inducted in possession.

16. Shri Narula has placed reliance on a decision of the Apex Court reported in A.I.R. 1956 S.C. page No.110 (Corporation of Calcutta vs.Mulchand Agarwala). The Apex Court in paragraph No.13 has held thus :

> "13. .....It must be remembered that the building rules are enacted generally for the benefit of the public, and where the rules have been violated and proceedings are taken for an

> order for demolition of the building under section 363 what has to be decided is whether the breaches are of a formal or trivial character in which case the imposition of a fine might meet the requirements of the case, or whether they are serious and likely to affect adversely the interests of the public, in which case it would be proper to pass an order for demolition...."

In paragraph 14 of the Judgment, the Apex Court held that there was a justification for passing order of demolition. However, the Apex Court did not pass order of demolition in view of long delay and in view of provisions of Section 368 (2) of the Calcutta Municipal act. The reliance placed on this decison is not going to help the case of the Appellant.

In this case the Appellant is guilty of serious breaches.

17. Shri Narula invited my attention to paragraph No.4 of the decision of the Apex Court in case of Syed (supra) which read thus :

> 4. However, it is to be pointed out that the mere departure from the authorised plan or putting up a construction without sanction does not ipso facto and without more necessarily and inevitably justify demolition of the structure. There are cases and cases of such unauthorised constructions. Some are amenable to compounding and some may not be. **There may be cases of grave and serious breaches of the licensing provisions or building regulations that may call for the extreme step of demolition.** (Emphasis supplied)

All that the Apex Court has said is that mere Departure from the authorised plan or putting up a construction without sanction does not ipso facto necessarily and inevitably

justify demolition of the structure. The Apex Court, however, held that there may be cases of grave and serious breaches of the building regulations that may call for extreme step of demolition. As stated earlier, present case is the case of grave and serious breaches by the Appellant as he was knowing fully well that the permission granted related to only ground floor and he constructed seven upper floors.

18. A reference will have to be made to the recent decision of the Apex Court reported in A.I.R.2005 S.C. page No. 1 (Friends Colony Development Committee vs. State of Orissa and others). The case before the Apex Court arose out of illegal development carried out by a builder to which provisions of Orissa Development Authorities Act, 1982 were applicable. In paragraph 25 of the decision, the Apex Court has made a distinction in case of professional builders. The Apex Court observed that the professional builder and deviations by such builder can safely be assumed to be deliberate and done with the intention of earning profits and hence deserve to be dealt with sternly so as to act as a deterrent for future. The Apex Court has recommended to the State Government to think of levying a heavy penalty on such builders which can be utilised for compensating and rehabilitating the innocent buyers. At this stage a reference will have to be made of another decision of the Apex Court reported in 1999 6 S.C.C.page No.464 (M.I.Builders Pvt.Ltd. vs. Radhey Shyam Sahu and others). What has been

held by the Apex Court is that no consideration should be shown to the builder or any other person where construction is unauthorised. The Apex Court in paragraph 73 held thus :

> "73. The High Court has directed dismantling of the whole project and for restoration of the park to its original condition. **This Court in numerous decisions has held that no consideration should be shown to the builder or any other person where construction is unauthorised. This dicta is now almost bordering the rule of law. Stress was laid by the appellant and the prospective allottees of the shops to exercise judicial discretion in moulding the relief. Such a discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorised construction, if it is illegal and cannot be compounded, has to be demolished. There is no way out.** Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing the robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. Judicial discretion wherever it is required to be exercised has to be in accordance with law and set legal principles. As will be seen in moulding the relief in the present case and allowing one of the blocks meant for parking to stand we have been guided by the obligatory duties of the Mahapalika to construct and maintain parking lots. (Emphasis supplied.)

The case of the Appellant-Plaintff is that due to pressure exerted by the flat purchasers he had to proceed with the construction of the building. The Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sale, Management & Transfer) Act, 1963 has been enacted for the

benefit of flat purchasers. If Section 3 of the said Act 1963 is considered along with the Rule 3 and 4 of the Rules framed under the said Act of 1963, it is obvious that obtaining building permission is a condition precedent for executing an agreement for sale in favour of the flat purchasers. That is why the law provides for giving inspection of the sanctioned plan to the flat purchasers before execution of the agreement for sale contemplated by the said Act of 1963. The Appellant is a professional builder. There is no reason for showing any leniency to the builder like Appellant who has high handedly proceeded with illegal construction of seven floors.

19. It is to be noted here that as of today there is no application made for regularization. The Appellant is claiming that he has acquired certain T.D.R. and files for grant of such TDR are yet to be processed. The prayer is for mandatory injunction directing the Corporation to process the files. The law provided remedy to the Appellant to apply for regularization in terms of Sub Section 3 of Section 53 of the said Act of 1966. Unfortunately, within the time prescribed by the law, any such application has not been made.

20. There is one more aspect of the matter which needs serious consideration. In August 2001 the Architect of the Appellant submitted the amended plans. Admittedly by that time huge construction of seven floors was completed and the

flat purchasers were placed in possession of the flats. It cannot be said that concerned Officers of Respondent No.1-Corporation had no knowledge of the said construction. However, till the end of year 2002 no action was taken by the concerned Officers of the Respondent No.1-Corporation. Even after the builder failed to submit the proposal for regularization within one month from the date of service of the notice dated 3rd December 2002, the concerned Officers only kept on corresponding with the owner and the builder requesting them to vacate the building.

21. Mr.Narula lastly submitted that limited prayer for grant of injunction be considered till the time the files are processed for acquiring the T.D.R.

22. Grant of temporary injunction is purely equitable and discretionary relief. In many matters, this Court has time and again protected unauthorised constructions for a limited period to enable the Municipal Corporation to consider the proposal for regularisation. However, considering the conduct of the Appellant such relief cannot be granted in favour of the Appellant. It is to be noted here that as of today also the T.D.R. is not actually available and there is no proposal submitted for regularization. Discretionary relief of temporary injunction cannot be granted in favour of such a builder who has taken law in his own hands. As held by the Apex Court in the case of M.I.Builders (supra),

discretionary relief cannot be granted in favour of the Appellant as grant of any such relief will encourage illegality and will perpetuate illegality. In case of illegal constructions, interim injunction for protecting structure can be granted only when there is a breach of principles of natural justice, or when construction is prima facie shown to be legal or when an unauthorised construction can be prima facie protected in terms of policies of the concerned local authority. In a given case, considering the overall conduct of a Plaintiff and facts and circumstances of the case, protection can be granted for a limited period for allowing consideration of applications for regularization. This is certainly not one of those cases where limited protection can be granted. The recalcitrant conduct of the Appellant comes in the way of granting even a limited protection. The construction has been deliberately carried out with full knowledge of the fact that it is contrary to building permission. A professional builder like Appellant needs to be dealt with sternly.

23. It is obvious that the real sufferers will be the flat purchasers. The construction of the seven upper floors of building cannot be tolerated at all. However, if the demolition is undertaken immediately, the flat purchasers will not get enough time to shift elsewhere or to seek appropriate relief against the Appellant. Therefore, demolition will have to be postponed for a reasonable time.

Notwithstanding the dismissal of this Appeal, for a period of four months from today the Respondent No.1-Corporation will not demolish the building. It is made clear that the time of four months is granted only for benefit of flat purchasers and the said time is not granted to enable the Appellant to apply for regularization.

24. The Appellant dragged the Respondent No.1 in unnecessary litigation. This is a fit case where professional builder like the Appellant should be ordered to pay compensatory costs. In fact there cannot be any better case where a litigant is made to pay compensatory costs. The amount of costs is quantified at Rs.30,000/-.

25. Hence I pass the following order :

i) Appeal from Order is dismissed. The Appellant is directed to pay compensatory costs of Rs.30,000/- to the Respondent No.1-Corporation within a period of six weeks from today.

ii) The Respondent No.1-Corporation will not take any action of demolition for a period of four months from today.

iii) Parties to act upon an authenticated copy of this order.

Judge.